Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

M. A.,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,
In the Interest of K.A., A Child,

Respondent.

On Petition For Writ Of Certiorari To The Colorado Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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41PP

QUESTION PRESENTED

Has the State met the due process requirement of the Fourteenth Amendment, where in a dependency and neglect case the trial court found by clear and convincing evidence the father sexually abused his daughter; the trial court ordered the father to undergo a sexual abuse evaluation and complete therapy as recommended; said therapy requires the father to admit to the sexual abuse and risk criminal prosecution in violation of his Fifth Amendment right to remain silent; and, then the trial court used father's refusal to admit and complete sexual abuse therapy as a basis to find noncompliance with the treatment plan and terminate the father's parental rights?

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PETITION FOR WRIT OF CERTIORARI

M.A. respectfully petitions for a writ of certiorari to review the decision of the Colorado Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Colorado Court of Appeals, (Appendix A, *infra*), was not selected for official publication. The District Court of Larimer County issued written findings and order terminating M.A.'s parental rights to his minor child, K.A., which are reproduced at Appendix D, *infra*. The order of the Colorado Supreme Court denying discretionary review is reproduced at Appendix E, *infra*.

JURISDICTION

The Colorado Court of Appeals entered its judgment on July 31, 1997. (Appendix A, *infra*, at A-1). The Colorado Supreme Court entered its order denying discretionary review on December 22, 1997. (Appendix E, *infra*, at E-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL AND COLORADO REVISED STATUTES

Amendment V to the Constitution of the United States provides, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

Amendment XIV to the Constitution of the United States provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Colorado Revised Statutes, Children's Code, Title 19, Article 3, Dependency and Neglect, § 19-3-304 and § 19-3-604 are reproduced at Appendix F, *infra*.

STATEMENT OF THE CASE

In May, 1994, the Assistant County Attorney for Larimer County, on behalf of the People of the State of Colorado, filed a Petition Neglected Or Dependent Child in the interest of a minor child, K.A., in the District Court of Larimer County, Colorado. M.A., Petitioner, is the natural father of K.A. On September 7, 1994, Petitioner appeared in District Court for an Adjudicatory Hearing, whereupon, Petitioner admitted to allegation "E" of the People's Petition which states that the environment of the Child, [K.A.], was injurious to her welfare. Based upon Petitioner's admission, the Court adjudged the Minor

Child, K.A., dependent and neglected. (Appendix B, *infra*, at B-2).

On February 10, 1995, a hearing was held before the District Court to determine an appropriate treatment plan. A treatment plan was adopted by the court, and a part of the plan was for M.A. to have an evaluation for sexual abuse issues and follow up treatment if recommended. (Appendix D, *infra*, at D-5). The evaluator did recommend therapy, but suggested that successful treatment would require M.A.'s active participation, including his admission to having perpetrated acts of abuse. Such an admission would have triggered Colorado's mandatory child abuse reporting statute, C.R.S. § 19-3-304, (Appendix F, *infra*, at F-1), requiring the therapist to report to local law enforcement. A report to law enforcement, in turn would carry with it a real possibility of criminal prosecution. Petitioner did not seek treatment addressing the sexual abuse concerns and continued to deny the allegations of abuse. (Appendix D, *infra*, at D-6).

On July 13, 1995, the Petitioner appeared before the District Court for a Permanency Plan addressing the placement of the minor child. The court adopted a Permanency Plan which included the termination of parental rights and that the child be made available for adoption. The court further ordered the People to continue to make reasonable efforts to reunify the child and her family. (Appendix C, *infra*, at C-3).

On January 22-24, 1997, the parties appeared in District Court on the People's Motion To Terminate the Parent-Child Legal Relationships existing between the child,

K.A., and Respondents M. A. and M.B., the child's biological mother. On January 31, 1997, the court entered Findings and Orders RE: People's Motion To Terminate Parental Rights, whereby the court terminated the parental rights of both parents. (Appendix D, *infra*, at D-4 and D-8).

On appeal, Petitioner alleged four errors in the trial court's termination of his parental rights. Alleged error number two pertains to the trial court's termination based upon M.A.'s failure to comply with the treatment plan because of his failure to pursue sexual abuse treatment which treatment would have required him to admit to sexually abusing his daughter. The court's finding of noncompliance was based on Petitioner's refusal to admit he had sexually abused his child and complete therapy. (Appendix A, *infra*, at A-5). The trial court found, by clear and convincing evidence, Petitioner had sexually abused his daughter. The Court of Appeals found no error, holding that the record in this matter established "that the trial court's finding of noncompliance was premised on father's failure to secure treatment, an express treatment plan requirement, and not on a surreptitious requirement that he admit to having sexually abused the child." (Appendix A, *infra*, at A-6). The Court of Appeals affirmed the judgment.

Petitioner respectfully submits that the Court of Appeals' decision puts him in the constitutionally untenable position of having to choose between his Fifth Amendment right against compelled self-incrimination and his Fourteenth Amendment right to maintain the structure and integrity of his family free from governmental interference.

This conflict highlights the need for additional guidance by this Court in the areas of compelled self-incrimination to comply with sexual abuse therapy to prevent termination of parental rights; the application of a clear and convincing standard of proof in terminating one's parental rights based upon alleged criminal conduct; and, how the procedure applied in this case violates one's Fifth Amendment right against self-incrimination and one's Fourteenth Amendment right to due process.

REASONS FOR GRANTING CERTIORARI

The trial court ordered a treatment plan requiring father to undergo a sexual abuse evaluation and to follow the recommendations of said evaluation. If the father was to follow such order and recommendation, requiring him to enter sexual abuse therapy, a major component of which is to admit responsibility for the sexual offense(s), this would require the father to waive his Fifth Amendment right against self-incrimination, where such therapy program is required to report said admissions to the local law enforcement agency. By compelling father to successfully complete therapy, i.e., admit to sexual abuse of his daughter, would then expose the father to possible criminal prosecution. If father asserts his Fifth Amendment right to not incriminate himself, thereby not successfully completing therapy, he exposes himself to the risk the trial court will terminate his parental rights for not complying with the treatment plan.

In this case, the trial court entered orders in which M.A. can only comply with by waiving his Fifth Amendment right against compelled self-incrimination. Such an order and requirement deprives M.A. of his fundamental liberty interest in the care, custody and management of his child which is protected by the Fourteenth Amendment. The procedure followed by the trial court denied M.A. of fundamentally fair procedures guaranteed under the Fourteenth Amendment.

THE DISPOSITION OF THIS CASE BY THE COLORADO COURT OF APPEALS DECIDES AN IMPORTANT FEDERAL QUESTION IN A WAY THAT VIOLATES PETITIONER'S RIGHT AGAINST SELF-INCRIMINATION AND DENIES PETITIONER OF A FUNDAMENTAL LIBERTY INTEREST OF A NATURAL PARENT IN THE CARE, CUSTODY, AND MANAGEMENT OF HIS CHILD WITHOUT DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

In the case at bar, Petitioner's child was adjudicated Dependent and Neglected based upon Petitioner's voluntary admission that the child's environment was injurious to her welfare. (Appendix B, *infra*, at B-2). Subsequently, a treatment plan was ordered by the court; and one of the conditions of the treatment plan was for Petitioner to undergo a sexual abuse evaluation and subsequent treatment as recommended. Petitioner denied committing any sexual abuse or that his daughter was sexually abused.

At the termination hearing, the trial court held the "evaluation clearly found that Petitioner needed treatment but that there may be difficulty in success of any

treatment without appropriate participation by the [Petitioner], including him admitting or facing up to his abusive acts." (Appendix D, *infra*, at D-6). The trial court terminated Petitioner's parental rights pursuant to C.R.S. § 19-3-604 (Appendix F, *infra*, at F-2) as stated in the trial court's Findings and Order RE: People's Motion To Terminate Parental Rights. (Appendix D, *infra*).

A key component of this scenario, yet overlooked by the trial court, is the requirement under Colorado law that any admission by Petitioner of any sexual abuse against his daughter would require the therapist, mental health professional, etc., to report said statements to the nearest law enforcement agency pursuant to C.R.S. § 19-3-304, (Appendix F, *infra*, at F-1), and thereby expose Petitioner to criminal prosecution. By making successful completion of sex offender treatment a condition of the treatment plan, the trial court has placed the Petitioner in a situation where he must admit to the abuse, whether factual or not, in violation of his Fifth Amendment right against compelled self-incrimination. If Petitioner does not admit to the abuse, he cannot successfully complete sex offender treatment. Thus, Petitioner risks having his parental rights terminated for noncompliance with the treatment plan.

This case differs from the due process argument presented in *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). In *Santosky*, this Court held the nature of minimum process due in parental rights termination proceedings is clear and convincing evidence. *Santosky* did not involve issues of a criminal nature or compelled self-incrimination in violation of the Fifth Amendment. In this matter, the trial court repeatedly

stated there was clear and convincing evidence to support the court's finding that Petitioner had sexually abused his daughter. But, the trial court adopted a treatment plan compelling the Petitioner to admit to sexual abuse and run the risk of criminal prosecution. If this had been a criminal proceeding, the state would have had to prove the allegations beyond a reasonable doubt to a jury of 12.

In *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), this Court held whether process is constitutionally due a natural parent at a State's parental rights termination proceeding, and, if so, what process is due. This court has historically recognized that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978). "If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections . . . When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." 455 U.S., at 753-754, 102 S.Ct., at 1395.

In the matter at hand, the trial court has put Petitioner in a position of risking criminal prosecution or having his parental rights terminated. Petitioner respectfully submits that such actions by the trial court are exactly the type of due process and Fifth Amendment issues this Court has concerns with and whether the procedures followed by the trial court satisfy the due process requirements under the Fourteenth Amendment.

CONCLUSION

Because the Colorado Court of Appeals has decided the instant matter in a way which compels Petitioner to waive his right against self-incrimination in order to prevent the termination of his parental rights, in derogation of Petitioner's rights under of the Fifth and Fourteenth Amendments, the Petition for Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

COLORADO COURT OF APPEALS July 31, 1997
No. 96CA0740 **NOT SELECTED FOR PUBLICATION**

The People of the State of Colorado,

Petitioner-Appellee,

In the Interest of K.A., a Child,

and Concerning M.A. and M.B.,

Respondents-Appellants.

Appeal from the District Court of Larimer County
Honorable William F. Dressel, Judge
No. 94JV179

Division IV JUDGMENT AFFIRMED
Opinion by JUDGE JONES
Kapelke and Roy, JJ., concur

Harden, Schmidt, Hass, Haag & Hallberg, George H. Hass, County Attorney, Linda K. Connors, Assistant County Attorney, Fort Collins, Colorado, for Petitioner-Appellee

Moore, Smith & Williams, P.C., Michael D. Liggett, Fort Collins, Colorado, for Respondent-Appellant M.A.

R. William Wawro, Fort Collins, Colorado, for Respondent-Appellant M.B.

In this dependency or neglect proceeding, M.A. (the mother) appeals from a trial court judgment terminating the parent-child legal relationship between her and her child, K.A., pursuant to § 19-3-604(1) (a), C.R.S. (1996

Cum. Supp.). M.A. the father appeals from a judgment terminating his parental rights pursuant to § 19-3-604(1)(c), C.R.S. (1996 Cum. Supp.). We affirm.

I. The Mother's Appeal

The mother contends that the evidence was insufficient to support the trial court's finding that she had abandoned the child. We disagree.

Under § 19-3-604(1)(a), C.R.S. (1996 Cum. Supp.), the parent-child legal relationship may be terminated if the evidence establishes, clearly and convincingly, that the child has been adjudicated dependent or neglected and has been abandoned by his or her parent. *People in Interest of A.M.D.*, 648 P.2d 625 (Colo. 1982). For the purpose of the statute, a child is abandoned if the parent has surrendered physical custody of the child for six months or more and has not manifested a firm intention to resume physical custody or to make permanent legal arrangements for the child's care. Section 19-3-604(1)(a)(I), C.R.S. (1996 Cum. Supp.).

Abandonment is a question of intent which is often determined by a parent's actions rather than by his or her words. *Moreau v. Buchholz*, 124 Colo. 302, 236 P.2d 540 (1951). Thus, a parent need not articulate an intent to abandon a child; instead, he or she must give due attention to parental responsibilities to preserve the parent-child legal relationship. In determining whether a parent has abandoned his or her child, the trial court must consider the totality of the circumstances, viewed in light of the child's best interests. *In re Petition of G.D.*, 775 P.2d 90 (Colo. App. 1989).

The credibility of the witnesses and the sufficiency of the evidence, its probative effect and weight, as well as the inferences and conclusions to be drawn therefrom, are within the discretion of the trial court. Thus, a trial court's findings and conclusions will not be disturbed on review if they are supported by the record. *People in Interest of M.S.H.*, 656 P.2d 1294 (Colo. 1983).

Here, the evidence shows that the mother and the father entered into an agreement whereby the father would pay the mother $10,000, plus medical expenses, to bear his child. Thereafter, a child was born in June 1991, and, pursuant to the agreement, the father, who was present for the birth, assumed custody of the child when she was two weeks old.

Thereafter, the mother and the child had little contact. The evidence shows that, in September 1992, the father and the child visited the mother at her place of residence in Minnesota. It also shows that the mother sent the child cards and gifts and telephoned her periodically. These minimal contacts did not enable the child to recognize the mother as her parent.

The evidence further shows that, after the dependency or neglect proceeding was filed in May 1994, the mother came to Colorado, entered an appearance in the proceeding, was advised of her rights, and visited the child one time. A social services caseworker advised the mother of the necessity of participating in a treatment plan if she wanted custody of the child.

The mother, however, refused to participate in a treatment plan, and stated that she was involved in the proceeding solely for the purpose of supporting the

father's bid to regain custody of the child. After the adjudicatory hearing in September 1994, the mother left Colorado, did not inform the caseworker of her whereabouts, and was not heard from again until November 1995 when she wrote a letter requesting visits with the child.

Although the mother testified, during the termination hearing, that she did not intend to abandon the child, the totality of the evidence reveals clearly and convincingly, that the mother did not, at any time after the birth of the child, intend to provide parental care for the child. Accordingly, we conclude that the trial court did not abuse its discretion in finding that the mother had abandoned the child. *See People in Interest of M.S.H., supra.*

We reject the mother's contention that the trial court erred in failing to approve a treatment plan for her. The petition in dependency or neglect and the motion for termination of the mother's parental rights were premised on abandonment. Thus, under § 19-3-604(1) (a), C.R.S. (1996 Cum. Supp.), a treatment plan was not required.

II. The Father's Appeal

A.

The father contends that the trial court erred in terminating his parental rights because the motion for termination was filed prematurely. Specifically, he argues that the requirements of the treatment plan had not been identified at the time the motion was filed because he had not yet completed the sexual abuse perpetrator evaluation. We disagree.

The record reveals that the treatment plan, which was adopted in February 1995, required the father to undergo a sexual abuse perpetrator evaluation and to follow through with any recommended therapy. In July 1995, the social services caseworker decided to file the motion to terminate because the father had not completed the sexual abuse perpetrator evaluation and the child had been in foster care for one year.

Contrary to the father's argument, the requirements of the treatment plan were identified at the time of its adoption, prior to the filing of the motion to terminate. Furthermore, the motion contained factual allegations as to the grounds for termination as required by § 19-3-602(1), C.R.S. (1996 Cum. Supp.). Accordingly, we find no error.

B.

The father next asserts that the trial court erred in terminating his parental rights for failure to comply with the treatment plan. He argues that the trial court's finding of noncompliance was based on his refusal to admit that he had sexually abused the child, an admission which was not required by the treatment plan. We find no error.

To terminate parental rights under § 19-3-604(1) (c), C.R.S. (1996 Cum. Supp.), the trial court must find, among other things, that an appropriate treatment plan, approved by the court, has not been complied with by the parent. It is the parent's responsibility to assure compliance with and success of the treatment plan. *People in Interest of A.H.*, 736 P.2d 425 (Colo. App. 1987).

Here, the treatment plan required the father to undergo a sexual abuse perpetrator evaluation and to participate in treatment if recommended by the evaluator. The evidence adduced at the termination hearing revealed that the father began the evaluation in April 1995; that the evaluation, which was completed in September 1995, recommended ongoing treatment; and that the father did not seek treatment because he disagreed with the evaluation and its recommendations.

Evidence also revealed that the father was unlikely to find a therapist who would treat him if he did not admit that he had sexually abused the child. Notwithstanding this evidence our review of the record establishes that the trial court's finding of noncompliance was premised on the father's failure to secure treatment, an express treatment plan requirement, and not on a surreptitious requirement that he admit to having sexually abused the child. *See People in Interest of A.H., supra.* Accordingly, we find no error.

C.

We reject the father's contention that the department's efforts to rehabilitate him were unreasonable because it did not refer him to specific therapists for individual therapy, sexual abuse perpetrator therapy, and family therapy.

The record reveals that the department referred the father to specific treatment facilities for his evaluations and that these facilities were to arrange for treatment providers if individual or sexual abuse perpetrator therapy was recommended. It further shows that a referral to

a family therapist was not made because the child was not emotionally ready to engage in family therapy. We conclude that these referrals were reasonable. *See* § 19-1-103(89), C.R.S. (1996 Cum. Supp.).

D.

Finally, the father contends that the trial court erred in finding that the treatment plan could not be modified and that there were no less drastic alternatives to termination. We disagree.

In determining a motion for termination of the parent-child legal relationship, the trial court must consider less drastic alternatives, giving primary consideration "to the physical, mental, and emotional conditions and needs of the child." Section 19-3-604(3), C.R.S. (1992 Cum. Supp.); *People in Interest of M.M.*, 726 P.2d 1108 (Colo. 1986).

The evidence adduced during the termination hearing shows that the father disagreed with the recommendation that he participate in sexual abuse perpetrator treatment. It further reveals that if the father agreed to treatment, it would take at least two-to-four years of therapy before he might regain custody of the child. The evidence also shows that the child had been in foster care for more than 18 months and that she needed a safe, stable, and permanent home, with loving, nurturing caretakers as soon as possible.

Finally, the father did not proffer any modifications which would warrant continuation of the treatment plan.

Thus, the trial court's findings as to modification of the treatment plan and less drastic alternatives to termination are supported by the record, and they will not be disturbed on review. *See People in Interest of M.S.H., supra.*

The judgment is affirmed.

JUDGE KAPELKE and JUDGE ROY concur.

APPENDIX B

DISTRICT COURT, LARIMER COUNTY, COLORADO
Case No. 94 JV 179 Courtroom R

ORDER OF ADJUDICATION

THE PEOPLE OF THE STATE OF COLORADO,
IN THE INTEREST OF:

KONICA ALAN,

Child,

AND CONCERNING:

MARK ALAN and MARTHA BATES,

Respondents.

This matter came before the Court for an Adjudicatory Hearing on September 7, 1994. The People of the State of Colorado were represented by Assistant Larimer County Attorney, Linda K. Dahn. The Respondents, Mark Alan and Martha Bates, were present in Court and represented by Michael Liggett, Attorney at Law. The Child was represented by the Guardian *ad litem*, Mark Schultheiss, Attorney at Law. The Court heard the comments of Counsel and the admissions of the Respondent, Mark Alan, and being adequately advised in the premises herein, HEREBY FINDS:

1. The Court has jurisdiction over the subject matter, personal jurisdiction over the parties and venue is proper.

2. The Respondent, Mark Alan, has admitted allegation "E" contained in Exhibit "A" to the People's Petition

for Dependent or Neglected Child which states that the environment of the Child, Konica Alan, was injurious to her welfare. Such admission was freely and voluntarily made by the Respondent, Mark Alan, and said Respondent was not under any duress or coercion to make such admission at any time.

3. There is a factual basis for the allegation set forth in paragraph 2 above, and such allegation has been sustained by a preponderance of the evidence.

4. Making reasonable efforts to reunify the Child with her family is and shall remain a part of the case plan in this matter. However, as a result of the specific facts of this case, such reunification would be contrary to the best interests of the Child at this time.

5. It is in the best interest of the Child, Konica Alan, that legal custody remain vested with the Larimer County Department of Social Services for appropriate placement in the least restrictive environment available outside of the home which is closest to the parents' home.

IT IS THEREFORE THE ORDER OF THIS COURT THAT:

A. The Child, Konica Alan, is hereby adjudged to be dependent and neglected.

B. Legal custody of the Child shall remain vested with the Larimer County Department of Social Services for appropriate placement in the least restrictive environment available outside of the home which is closest to the parents' home.

Done this 15th day of September, 1994 *nunc pro tunc* September 7, 1994.

BY THE COURT:

/s/ Joseph R. Coyte
District Court Magistrate

APPENDIX C

DISTRICT COURT, LARIMER COUNTY, COLORADO
Case No. 94 JV 179 Courtroom R

PERMANENCY PLANNING ORDER AND ORDER APPROVING ONGOING PLACEMENT

THE PEOPLE OF THE STATE OF COLORADO,
IN THE INTEREST OF:

KONICA ALAN,

Child,

AND CONCERNING:

MARK ALAN and MARTHA BATES,

Respondents.

This matter came before the Court for adoption of a permanency plan on July 13, 1995. The People of the State of Colorado were represented by Assistant Larimer County Attorney, Linda K. Dahn. The Respondent, Mark Alan, was present and was represented by Michael Liggett, Attorney at Law. The Respondent, Martha Bates, did not appear. The Guardian *ad litem*, Mark Schultheiss, Attorney at Law, represented the Child. The Court has reviewed the permanency plan prepared by Nancy Roath, a social caseworker employed by the Larimer County Department of Social Services and set forth in a letter dated July 6, 1995. The Court has reviewed the file and heard the comments of Counsel and, being adequately advised in the premises herein HEREBY FINDS:

1. The Court has jurisdiction over the subject matter, personal jurisdiction over the parties and venue is proper.

2. Pursuant to §19-3-702(2) C.R.S. appropriate notice of the Permanency Planning Hearing was given to all appropriate parties.

3. Reasonable efforts to prevent out-of-home placement of the Child has been attempted and have failed. Pursuant to the facts and circumstances set forth in the permanency plan prepared by Nancy Roath and set forth in a letter dated July 6, 1995, it would be contrary to the best interests of the Child to be returned to the custody of the Respondents at this time. Further, there is not a substantial probability that the Child will be returned to the physical custody of the Respondents within six months of the date this Order is executed.

4. The People intend to pursue termination of the Parent-Child relationships as a permanent plan in this matter. Although the Court understands the state's need for a permanency plan, it is not appropriate or in the best interests of any party to enter an order terminating the parent-child relationships in this matter without a hearing. Further, although a motion has been filed seeking to terminate the parent-child legal relationships, until such time as that hearing is held, it would not be appropriate to allow the People to abandon efforts to reunify the family.

5. In light of the above, the Court finds the permanency plan prepared by Nancy Roath and set forth in a letter dated July 6, 1995, to be appropriate and in the best interest of the Child.

6. The Court finds that the Child shall be continued in foster care for a period of time not to exceed 180 days without review. The Child's current placement is specifically approved by the Court and shall be reviewed no later than 180 days after the execution of this Order.

7. In light of the above, it is appropriate and in the Child's best interests that legal custody of the Child remain vested with the Larimer County Department of Social Services.

IT IS THEREFORE THE ORDER OF THIS COURT THAT:

A. The permanency plan prepared by Nancy Roath and set forth in a letter dated July 6, 1995, is hereby approved as appropriate and in the best interests of the Child. A copy of such plan is attached hereto as Exhibit "A" and by this reference is incorporated into the terms of this decree as though set fully herein.

B. Legal custody is hereby vested with the Larimer County Department of Social Services for appropriate placement in the least restrictive environment available outside of the home which is closest to the parents' home as deemed appropriate by the Larimer County Department of Social Services. This placement shall be reviewed no later than 180 days after the date of execution of this Order.

C. Until such time as a hearing is held on the People's Motion to Terminate the Parent-Child Legal Relationships, the People shall continue to make reasonable efforts to reunify the Child and her family.

Dated this 4th day of August, 1995.

BY THE COURT:

/s/ Joseph R. Coyte
District Court Magistrate

CERTIFICATE OF MAILING

I hereby certify that I placed a true and correct copy of the above and foregoing Permanency Planning Order in the United States mail, postage prepaid, this 22nd day of August, 1995 addressed to:

Michael Liggett
425 W. Mulberry #112
Fort Collins, CO 80521

R. William Wawro
125 S. Howes #1000
Fort Collins, CO 80521

Mark Schultheiss
215 West Oak
Fort Collins, CO 80521

RULE 121

YOU ARE HEREBY NOTIFIED PURSUANT TO THIS COURT'S POLICY AND RULE 121 THAT IF YOU HAVE ANY OBJECTION TO THE FORM OF THIS ORDER, YOU MUST NOTIFY THE COURT WITHIN FIFTEEN (15) DAYS FROM THE DATE OF THE SIGNING OF THE ORDER. IF NO OBJECTION IS RECEIVED BY THE COURT WITHIN FIFTEEN (15) DAYS FROM THE DATE OF THE SIGNING OF THE ORDER, THE ORDER SHALL REMAIN IN EFFECT IN THE FORM IT WAS SIGNED.

/s/ Christine Seneca

APPENDIX D

DISTRICT COURT, COUNTY OF LARIMER,
STATE OF COLORADO

CASE NUMBER 94 JV 179, Courtroom 2

FINDINGS AND ORDERS RE: PEOPLE'S MOTION TO TERMINATE PARENTAL RIGHTS

THE PEOPLE OF THE STATE OF COLORADO,
IN THE INTEREST OF:

KONICA ALAN,

Child,

AND CONCERNING:

MARK ALAN AND MARTHA BATES,

Respondents.

(Filed Jan. 31, 1996)

This matter came on before the Court on January 22-24, 1996 for hearing on People's Motion to Terminate the Parent-Child Legal Relationships existing between the child Konica Alan and the respondents Mark Alan and Martha Bates. The People were represented by Linda K. Dahn and J.S. Haag, Assistant County Attorneys; respondent Mark Alan appeared and was represented by Michael D. Liggett, attorney at law, respondent Martha Bates appeared and was represented by R. William Wawro, attorney at law; and Mark Schultheiss, as guardian ad litem. The Court having reviewed the file, including previous orders made, reviewed exhibits, heard testimony and statements of counsel, makes the following Findings and Orders:

1. The Court has jurisdiction over the subject matter, personal jurisdiction over the parties and venue is proper.

2. The child Konica S. Alan was born June 20, 1991 and is currently four (4) years old.

3. The natural mother of the child is the respondent G. Martha Bates and the natural father is the respondent Mark Alan.

4. On May 4, 1994, the Court authorized the filing of a petition for neglected or dependent child and granted temporary custody of the child Konica Alan to the Larimer County Department of Social Services. The child has resided outside of the parents' home continuously up through the hearing on termination of parental rights and placement so continues until further order of Court.

5. On September 7, 1994, the child was adjudicated to be dependent and neglected based upon admission by the respondent Mark Alan that the environment of the child Konica Alan was injurious to her welfare with a written order of adjudication issued September 15, 1995, *nunc pro tunc* to September 7, 1994. Thereafter, the Court held a number of hearings to determine an appropriate treatment plan and address visitation issues and on February 10, 1995, a hearing was held on the treatment plan with the Court issuing a written Order adopting a treatment plan (deleting proposed element 2) on February 13, 1995.

6. On July 26, 1995, the People filed a motion to terminate the parent-child legal relationship existing between the child Konica Alan and the respondents.

A. RESPONDENT MARTHA BATES

The evidence established that the respondent Martha Bates a.k.a. G. Martha Bates is the natural mother of the child Konica Alan. Ms. Bates has described herself as a "surrogate mother" and has not, subsequent to the birth of the child, provided any care, parenting, significant contact or manifested any intent to provide care or parenting for the child. Ms. Bates did visit with the child early in her life on her birthday and has had a couple of telephone calls and sent some presents or cards. Ms. Bates and the respondent Mark Alan reached an agreement whereby Mr. Alan would pay her the sum of ten thousand dollars ($10,000.00) and her expenses related to the fertilization process, pregnancy and birth. Ms. Bates gave birth to Konica in the State of Minnesota and within weeks turned her over to Mr. Alan who subsequently moved to the State of Colorado. Ms. Bates was advised of the termination of parental rights matter involving not only Mark Alan's status, but hers. Ms. Bates has been represented by either Mr. Liggett or Mr. Wawro throughout these proceedings. Ms. Bates was advised of her rights in this matter including her right to participate in a treatment plan but declined to be involved in any treatment plan with her sole involvement to support Mr. Alan's request that the child be returned to his custody.

The Court finds by clear and convincing evidence that the respondent Martha Bates has abandoned the child Konica Alan; she has not had contact with the child for a period greater than six (6) months and had clearly and convincingly manifested her intent not to obtain physical custody or provide permanent legal arrangements for the care of the child. Further, the evidence

clearly establishes that the respondent Martha Bates is an unfit parent and is unable to provide for the emotional and physical needs of the child Konica Alan and she is unlikely to change within a reasonable period of time so as to render her a fit parent capable of caring for the child. In essence, Ms. Bates has never assumed the role of a parent and never intended to care for the physical or emotional needs of the child but simply engaged in a business enterprise for financial gain by giving birth to the child. There is no less drastic alternative available to the Court other than to terminate the parent-child legal relationship existing between the child Konica Alan and the respondent Martha Bates a.k.a. G. Martha Bates; and it is in the best interests of the child Konica Alan that any parent-child legal relationship existing between her and the respondent Martha Bates a.k.a. G. Martha Bates be terminated.

IT IS, THEREFORE, THE ORDER OF THIS COURT THAT:

The parent-child legal relationship, if any, existing between the child Konica Alan and the respondent Martha Bates, a.k.a. G. Martha Bates is hereby terminated and the child and said respondent are divested of all legal rights, powers, privileges, immunities, duties and obligations each with respect to the other, except that this Order shall not modify the child's status as an heir at law.

B. RESPONDENT MARK ALAN

The petition alleging dependency and neglect was based upon alleged physical abuse and ongoing medical and physical neglect of the child while in the care of the

respondent father Mark Alan. The child had numerous bruises and abrasions on her body and exhibited poor general health and a "traumatized demeanor" all as described in the various presentations to the Court including, but not limited to:

> Child shaking or rocking her head or body back and forth for extended periods of time, withdrawing from contact by covering up her face with her hands and arms; exhibiting lack of trust of others, and engaging in excessive masturbation for a child her age.

After the finding of dependency and neglect based upon respondent Mark Alan's admission of an injurious environment, the Court was presented with a treatment plan. Respondent objected to the treatment plan and hearing was held before the Court which approved the treatment plan except for element 2 which required the father to obtain an additional psychological evaluation. The Court found that the father did not need to obtain an additional psychological evaluation but that the other elements, including respondent Mark Alan to have an evaluation for sexual abuse issues and follow up treatment if recommended, was appropriate per the Order of Magistrate Coyte dated February 13, 1995 which is incorporated herein and made a part of these Findings and Order. The evidence presented before this Court was similar to and supported the Magistrate's February 13, 1995 Findings and Order. The evidence clearly and convincingly established both that the child Konica Alan had been subjected to physical abuse, deprivation of appropriate parenting and sexually abused. The evidence was not contradicted and clearly and convincingly established

that the perpetrator of the physical, mental abuse and deprivation was the respondent Mark Alan. Respondent Alan denied committing any sexual abuse or that the child Konica was sexually abused. The majority of the evidence received was directed towards the issue of whether or not the child was sexually abused and respondent as the perpetrator of that abuse.

Based on the evidence presented to the Magistrate, the Magistrate found that the element of the treatment plan requiring respondent Mark Alan to undergo a sexual abuse evaluation and subsequent treatment was appropriate. Respondent Alan contended that he was not appropriately advised of the requirement for sexual abuse treatment. The evidence presented at the termination hearing clearly contradicts respondent's denial of knowledge that it was his responsibility to obtain treatment. The evaluation clearly found that defendant needed treatment but that there may be difficulty in success of any treatment without appropriate participation by the respondent Alan, including him admitting or facing up to his abusive acts. Respondent Alan was not placed in a "catch 22" but clearly had knowledge that a significant element of the treatment plan leading to the child being returned to him or eventual termination evolved around addressing the sexual abuse concerns. Yet respondent Alan chose to ignore this requirement and did not seek out treatment that would address this concern. There was evidence that treatment without admission may present problems but respondent Alan did not even pursue any sexual abuse treatment programs although programs are available to him.

This Court recognizes the difficulties in making a determination by clear and convincing evidence whether a child the age of Konica was sexually abused which is further made difficult by her lack of verbal skills commensurate with a child her age. However, based upon the evidence presented, this Court clearly and convincingly finds that the child Konica Alan was sexually abused and that the perpetrator of that abuse was her father the respondent Mark Alan. Mr. Alan provided the care for the child up until the time she was removed by the People. He and the child resided in either a residence wherein they rented a room or an apartment and throughout her young life the child and respondent slept together on a mattress laid upon the floor. The child was in day care while the respondent worked, but if any of said providers were the individuals responsible for the abuse, then respondent as a responsible parent clearly would have noticed the behavior and responded to that abuse and sought out help. The Court has considered that the child may have been influenced by others once she was taken from respondent's care but such actions would not be responsible for the physical manifestations or conduct of the child evidencing sexual abuse including her outcries at night while asleep and her statements to her therapist Rachel Moriarty.

While respondent Alan has complied with some provisions of the treatment plan, he has failed to comply with the critical element of the Court-adopted treatment plan regarding sexual abuse treatment. The Court finds that the respondent Mark Alan is an unfit parent and remains unable to provide for the emotional and physical needs of the child Konica Alan; it is unlikely that the

conduct, condition or fitness of respondent Alan will change within a reasonable period of time so as to render him a fit parent capable of caring for the child; there are no modifications to the treatment plan which could be developed to enable respondent Alan to become a fit parent capable of caring for the physical and emotional needs of the child within a reasonable period of time; there is no less drastic alternative available to the Court other than to terminate the parent-child legal relationship existing between the child Konica Alan and respondent Mark Alan; and it is in the best interest of the child Konica Alan that any parent-child legal relationship existing between the child and respondent Alan be terminated and said Findings are supported by clear and convincing evidence.

IT IS, THEREFORE, THE ORDER OF THIS COURT THAT:

The parent-child legal relationship, if any, existing between the child Konica Alan and the respondent Mark Alan is hereby terminated and the child and respondent Mark Alan are divested of all legal rights, powers, privileges, immunities, duties and obligations each with respect to the other, except that this Order shall not modify the child's status as an heir at law.

C. GUARDIANSHIP AND LEGAL CUSTODY

Guardianship and legal custody of the child Konica Alan is hereby awarded to the People of the State of Colorado with placement to continue with the Larimer County Department of Social Services. This matter shall

be continued to the 16th day of April, 1996 at the hour of 8:45 a.m. for review.

BY THE COURT this 31st day of January, 1996.

William F. Dressel
WILLIAM F. DRESSEL
District Court Judge

CERTIFICATE OF MAILING

This is to certify that on the 31st day of January, 1996, a true and correct copy of the above and foregoing Order was delivered to the attorney of record and parties appearing pro se in the following manner:

For counsel in Fort Collins, who have agreed to such procedure: by placing said copy in the attorney's pick-up box located in the Larimer County Courthouse, 200 West Oak, Fort Collins, Colorado.

For all other counsel, or parties appearing pro se: deposited in the United States Mail with the correct postage affixed thereon.

/s/ Marilyn W. Scheinost

cc: Dahn
Liggett
Wawro
Schultheiss

APPENDIX E

SUPREME COURT, STATE OF COLORADO
CASE NO. 97SC800
CERTIORARI TO THE COLORADO COURT OF APPEALS, 96CA0740
DISTRICT COURT, LARIMER COUNTY, 94JV179

ORDER OF COURT

(Filed Dec. 22, 1997)

M.A.,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO

Respondent,

In the Interest of K.A., A Child.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, DECEMBER 22, 1997.

cc:

[seal]

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Larimer County Courthouse
P.O. Box 2066
200 West Oak
Fort Collins, CO 80522

Honorable William F. Dressel
Larimer County Courthouse
P.O. Box 2066
200 West Oak
Fort Collins, CO 80522

Patrick H. Stanford, Clerk
Colorado Court of Appeals

APPENDIX F

COLORADO REVISED STATUTE

CHILDREN'S CODE

ARTICLE 3

DEPENDENCY AND NEGLECT

19-3-304. Persons required to report child abuse or neglect. (1) * * * any person specified in subsection (2) of this section who has reasonable cause to know or suspect that a child has been subjected to abuse or neglect or who has observed the child being subjected to circumstances or conditions which would reasonably result in abuse or neglect shall immediately report or cause a report to be made of such fact to the county department or local law enforcement agency.

(2) Persons required to report such abuse or neglect or circumstances or conditions shall include any:

(a) Physician or surgeon, including a physician in training;

(b) Child health associate;

* * *

(n) Mental health professional;

* * *

(p) Psychologist;

* * *

19-3-604. Criteria for termination. (1) The court may order a termination of the parent-child legal relationship upon the finding by clear and convincing evidence of any one of the following:

* * *

(c) That the child is adjudicated dependent or neglected and all of the following exist:

(I) That an appropriate treatment plan approved by the court has not been reasonably complied with by the parent or parents or has not been successful or that the court has previously found, pursuant to section 19-3-508 (1)(e), that an appropriate treatment plan could not be devised if a child is under six years of age at the time a petition is filed in accordance with section 19-3-501 (2), no parent or parents shall be found to be in reasonable compliance with or to have been successful at a court-approved treatment plan when:

(A) The parent has not attended visitations with the child as set forth in the treatment plan, unless good cause can be shown for failing to visit; or

(B) The parent exhibits the same problems addressed in the treatment plan without adequate improvement, including but not limited to improvement in the relationship with the child, and is unable or unwilling to provide nurturing and safe parenting sufficiently adequate to meet the child's physical, emotional, and mental health needs and conditions despite earlier intervention and treatment for the family. The court may receive testimony regarding the family's progress under the treatment plan from the child's physician or therapist,

foster parent, educational or religious teachers, court-appointed special advocate, or caseworker.

(II) That the parent is unfit; and

(III) That the conduct or condition of the parent or parents is unlikely to change within a reasonable time.

* * *